No. 3037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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PERNAU-WALSH PRINTING CO.

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Throughout this brief we shall call the Trojan Powder Company "plaintiff", and the Fireman's Fund Insurance Company "defendant", their designation in the court below, instead of reversing their positions and titles, as is done in this court, which we think might lead to confusion.

The decision of this case rests principally upon the due appreciation of what are the material facts.

It appears to us that in the court below, as well as in this court, the appellant depends upon what appears to us to be a misapprehension in this regard. He dwells entirely upon matters that are

not determinative of the issue, and absolutely disregards those that *are* determinative. In so doing, he naturally creates false issues.

Statement of the Case.

In August, 1912, the defendant issued to plaintiff a policy of insurance in the sum of $35,000.00, covering 6000 cases of high explosives laden on board the ship "Pleiades" for a voyage from the port of San Francisco to the port of Balboa, Isthmus of Panama.

The material provisions in that policy were as follows:

> "And the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel, Craft or Boat *as above* and continue until the said Goods and Merchandise be discharged and safely landed at *as above.*"

The *"as above"* relates to the following provision of the policy:

> "And it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) *at and from San Francisco Bay to Balboa.*"

The policy further provides:

> "And touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas * * *

and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof."

Then follows the "sue and labor" clause, after which we have two clauses expressly referring to the bill of lading, as follows:

"General Average payable as per foreign statement or per York Antwerp Rules of 1890 if in accordance with the *contract of affreightment.*

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion *in the bill of lading* of the London conference rules of affreightment 1893, or of the following clause:

'The Act of God, perils of the sea * * * and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.' "

Then we have the particular average clause and the provision saving the "forwarding charges" from the effect of the particular average warranty:

"Warranted free from average unless general or the ship or craft be stranded, sunk or burnt * * *

Underwriters notwithstanding this warranty to pay * * * any special charges for warehouse, rent, reshipping or forwarding for which they would otherwise be liable, etc."

Then a provision making the laws and *customs* of England the rule of decision:

"All questions of liability arising under this policy are to be governed by the laws and customs of England."

The contract of affreightment contained a provision that

> "It is agreed that said freight, whether prepaid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, and *on the happening of any of the herein excepted contingencies,* the carriers are to have the right to forward the above mentioned packages to the port of destination on their own routes, and *shall receive extra compensation* for such service, *whether performed by their own vessels* or those of strangers."

Among the "excepted contingencies" provided in said bill of lading, or contract of affreightment, were:

> "*Stranding,* straining, any accident on or perils of the seas or other waters, or of steam or inland navigation; * * * *detention or accidental delay,"* etc. (Back of Bill of Lading Par. 3.)

Under these conditions, the vessel, with said cargo on board, proceeded from the port of San Francisco on her voyage to the port of Balboa, and on the 16th day of August was stranded off the coast of Mexico, where the vessel, together with the cargo, was in danger of becoming a total loss.

While in this situation, on the 29th day of August, the plaintiff abandoned said cargo to the underwriters.

Thereafter the said vessel and cargo were salved, but the vessel was in such a damaged condition that she was unable to proceed upon her voyage, and

was brought back to the port of San Francisco for repairs.

The vessel was detained at the port of San Francisco until the 27th day of December following, and abandoned the said voyage entirely.

The said cargo had been discharged into lighters pending said repairs.

The plaintiff desired the cargo to be forwarded to the port of destination, and to this end conferred with the defendant, who declined to have anything to do with it. (Rec. p. 53.)

There were only two companies handling freight of that kind to the port of Ancon, Balboa, one of which was the charterer of the damaged vessel. (Rec. p. 53.)

Plaintiff applied to the said charterer to forward the cargo by its next vessel, the "Mackinaw", sailing October 17th, but said charterer refused to forward it *except upon the payment of extra freight money* ($4050.00), *in accordance with the terms of their bill of lading.* (Rec. p. 53.) The payment was accordingly made and the cargo forwarded to its destination.

The cargo had been sold to the Panama Canal Commission, which had the privilege of refusing the shipment if it did not arrive within a fixed time, and there was no market at the port of destination for such cargo, there being no buyers other than the Panama Canal Commission. (Rec. p. 54.)

Though we do not consider this material, defendant does, and so we include it in this statement.

So far, the facts are undisputed.

It is set up in the complaint, Article V, page 6:

> "That it is the law of England that if by reason of damage done to the ship, she cannot be repaired without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination."

This is admitted in the answer. (Art. V, p. 20.)

It is further alleged (Art. VI, p. 6) that

> "It is the law of England that where freight is paid in advance, and the contract of carriage provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the shipowner when the cargo is received on board; and the right of the shipowner thereto does not depend on the delivery of the cargo at the port of destination."

This allegation is denied, though it is admitted that the right of the shipowner to prepaid freight does not depend on the delivery of the cargo at the port of destination.

Defendant, however, alleges that

> "this does not relieve the shipowner of his obligation to exercise due diligence to carry the cargo so paid for forward to destination, and that freight paid in advance is not earned if the vessel or goods *be lost by* any *negligence* for which the shipowner is responsible." (Italics our own.) (Rec. pp. 20, 21.)

What that has to do with this case, even if true, we cannot comprehend, as there is no allegation or proof of such negligence. Neither is there any proof otherwise to support the allegation.

It is further alleged that

> "It is further the law of England that, in a case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring the said merchandise to the port of destination, such expense is a loss directly due to such peril insured against for which the insurer is liable." (Art. VII, p. 6.)

This is denied. (Rec. p. 22.)

The next cause of action sets up that under such a contract of carriage and the facts set forth,

> "It is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to said peril," (Art. VIII, pp. 11 and 12),

—which is denied (pp. 28 and 29).

The fourth cause of action sets up the "sue and labor" clause.

The defendant sets up affirmative defenses, which are paraphrased as follows:

1. That the vessel was completely repaired, and was thereafter *able to complete* said voyage and carry said cargo to destination. (Italics our own.) (p. 34.)

That under the law of England it was the obligation of the carrier to transport said cargo to its destination *without requiring the payment of second freight,* and if plaintiff paid an additional freight, said payment was voluntary, without waiting for the completion of the repairs on said steamship, and it was not caused by the perils insured against and by the law of England did not constitute a liability under the terms of the policy.

2. That if by reason of the specific purpose for which said goods were intended, or of the contract under which said goods were sold, said goods could not be detained until the completion of the repairs of said steamer and thence forwarded in said steamer to the port of destination, under the law of England such extra freight as was paid did not constitute a charge or liability under said policy because not caused by perils insured against.

3. That the said extra freight was not in excess of the original freight, and was not due to any peril insured against by said policy, but resulted from the nature of the contract of carriage.

4. That if by reason of the contract of sale the goods could not be detained at the port of San Francisco until the completion of the repairs, such fact was not disclosed by plaintiff to defendant, and constituted concealment of facts material to the risk.

Argument.

From the foregoing, the following facts stand out clear and undisputed:

1. That by reason of stranding and consequent damage, the vessel returned to the port of original shipment for repairs. That she was *detained* by the stranding and repairs for 4 months and 11 days, and *never thereafter proceeded upon the insured voyage.*

2. That, by the contract of affreightment, on the happening of stranding, detention or accidental delay, the carrier had the right to forward the merchandise either by its own vessels, or other vessels, and receive extra compensation for such service.

3. That the policy, expressly and in terms, recognizes that the insurance is effected and based upon the contract of affreightment or bill of lading. If this were not so expressly recognized, the contract of affreightment would still, under the law, as we shall presently see, be held to be the basis of the insurance.

4. That [admitted by the pleadings] it is the law of England that if by reason of damage done to the ship, she cannot be repaired without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination. Of course, in so doing, the master acts as the agent of all concerned, and what the agent may do, his principals may do.

5. That [admitted by the answer] under the law of England the right of the shipowner to prepaid freight does not depend on the delivery of the cargo at the port of destination.

6. We think it also proven beyond dispute that it is the law of England that under such contract of affreightment, the freight is earned by the ship owner when the cargo is received on board.

7. That the policy expressly provides that liability is to be governed by both the laws and the *customs* of England.

8. That the policy expressly provides that *notwithstanding* the free from average warranty, underwriters agree "to pay * * * any special charges for warehouse rent, reshipping or forwarding for which they would otherwise be liable".

The case then reduces itself to the question whether or no the defendant would, under the laws *or the customs* of England, be liable for forwarding charges.

I.

THEY ARE A DISTINCT CLASS OF LOSS, RECOVERABLE UNDER THE POLICY THOUGH NOT SPECIALLY ENUMERATED.

The first thing, necessary for us, is to get clearly in our minds the nature, from an insurance point of view, of this loss. Though the context, in which forwarding charges are mentioned in this policy,

would warrant the construction that the policy treats them as an average loss (as do also the decisions which hold that recovery for such expenditure is excluded by the warranty free from particular average) it seems that by the customs and usage of England such charges are distinguished as "particular charges", or, *in the terms of the policy,* "special charges for *warehouse rent, reshipping or forwarding*".

Speaking of such charges, *Arnould,* in his work on *Marine Insurance* (8th Ed., Sec. 869), says:

> "*Another class* of losses, which, *though not specially enumerated in the policy, are nevertheless recoverable thereunder,* is that which is embraced under the term 'particular charges'. The distinction between 'particular charges' and 'particular average' was first definitely established in our Courts in Kidston v. Empire Insurance Co., where the jury after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning *affixed by long usage* to the term 'particular average' as distinguished from the term 'particular charges', viz., that 'particular average' denotes actual damage done to or loss of part of the subject matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject matter of insurance; and that *expenses incurred in warehousing and forwarding goods* are not 'particular average', but are termed *'particular charges'*.
>
> Accordingly sec. 64, sub-sec. (2), of the Marine Insurance Act states that 'expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter

> insured, *other than* general average and *salvage* charges, are called 'particular charges. Particular charges are not included in particular average'. They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable if it were so caused. In this event they are charges incurred 'in and about the defense and safeguard' of the subject-matter of insurance, within the suing and laboring clause. In certain cases *they may also be recoverable* from underwriters, *apart from the suing and laboring clause*, as losses occasioned by a peril insured against *when they have been necessarily incurred in consequence of such a peril*—as, for example, *expenses of warehousing and forwarding cargo when a peril insured against has occasioned the necessity of such expenditure.*"

The same author thereafter (Sec. 214) says:

> "*When, in consequence* of a peril insured against, *the voyage cannot be accomplished in the original ship,* it seems that the excess of the expense to which the *owner of the goods* is put in bringing them to their destination over the freight which he would have had to pay in the ordinary course *is a loss directly due to such peril. The practice of underwriters has been to pay such excess as particular charges, and as one of the objects of an insurance on goods is to guarantee that the goods shall reach their destination,* it is submitted that this practice is correct in principle. It is certainly not inconsistent with the provisions of the Marine Insurance Act."

It would seem that the foregoing is a clear and explicit statement on the part of that learned

author, that under both the law and *the custom* of England these particular forwarding charges are recoverable *even though not specially enumerated in the policy.*

Defendant's whole case rests upon the contention that "particular charges" partake of the nature of recoveries under the "sue and labor" clause, and are subject to the rule that they must *only* include expenditures *which tend to prevent the loss* for which recovery otherwise might be had against the underwriters. (Br. pp. 12 and 13.)

If that were true, there would be no such a classification as "particular charges". They would all be comprised in "sue and labor" charges, from which there would be no distinction. It is significant that, in this connection, the learned author does *not* agree with the defendant, but, after referring to expenses recoverable under the "sue and labor" clause, specifies this particular class of expenditures as "certain cases" which "may *also* be recoverable from underwriters, *apart* from the suing and laboring clause, *as losses occasioned by the peril insured against*".

It is our present purpose to bring out clearly this point of distinction between these "particular charges" and "sue and labor" charges, which appellant seems to confound.

It is conceded that, in order to recover under the "sue and labor" clause, it must appear that the expense was incurred *to prevent* the cargo from being

lost by an *impending* peril. A "particular charge", however, may be different, in that it is not incurred in order to *prevent* a loss from *impending* peril, but is incurred *in consequence* of such a peril. That is, the peril is no longer impending, but, by reason of the peril—or in consequence of the peril—the *enterprise* or voyage insured is threatened with frustration and the expense is incurred to prevent that frustration.

That is the distinction which our learned author makes, and the distinction necessarily follows from the very nature of the expenses named by the learned author as being "particular charges", namely, "expenses incurred in warehousing and forwarding the goods".

Nothing can be more explicit than the author's own language, namely:

> "In certain cases they may also be recoverable from underwriters, *apart from the suing and laboring clause,* as losses *occasioned* by a a peril insured against when they have been necessarily incurred *in consequence* of such a peril —as, for example, *expenses of warehousing and forwarding cargo,* when a peril insured against *has occasioned the necessity* of such expenditure."

They are:

> "Another *class* of loss, which, though *not* specially *enumerated in the policy,* are nevertheless recoverable thereunder."

What is meant by having "occasioned the necessity of such an expenditure", is further illustrated by what the author says in Sec. 214:

> "When, in consequence of a peril insured against, *the voyage cannot be accomplished* in the original ship, it seems that the excess of the expense to which the owner of the *goods* is put in bringing them to their destination, over the freight which he would have had to pay in the ordinary course, *is a loss directly due to such a peril.*"

And it is a "loss directly due to such a peril" because, as the author further says in referring to the practice of underwriters to pay such charges:

> "As one of the objects of an insurance on goods is *to guarantee that the goods shall reach their destination,* it is submitted that this practice is correct in principle."

It will also be observed that it is admitted by the pleadings, that

> "It is the law of England that if by reason of damage done to the ship she cannot be repaired *without a very great loss of time,* the master is at liberty to procure another ship to transport the cargo to the place of destination." (Ans., Art. V, Rec. p. 20.)

The contract of affreightment also provides that the original freight is earned, ship or goods lost or not lost at any stage of the entire transit, and upon the happening of any of the excepted contingencies (stranding, *detention, accidental delay)*, carrier shall have the right to forward the goods to port of destination and receive extra compensation.

In this connection the following from the *Great Indian Peninsular Railway* case, upon which defendant places so much reliance, is instructive:

> "As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole sum of £825, 11s., 7d., was an extra expense incurred by the owner of the goods, *in consequence* of the sea risk, which *had frustrated the voyage* of the 'Bombay'; and the question we have to determine is, whether the insured can recover this sum on a policy containing *this warranty*", namely the F. P. A. warranty. (Rec. p. 69.)

It seems to us from the foregoing, that nothing can be plainer than that the basis of these "particular charges" is not, as in the case of a "sue and labor" charge, that it shall "tend to prevent the loss for which recovery might otherwise be had", but that it is sufficient if the loss insured against shall give rise to a situation rendering it necessary to incur the expense in order "that the goods shall reach their destination", in accordance with the contract of affreightment.

This distinction applies with equal force and effect to the second proposition made by appellant in his brief (p. 29), namely:

> "Neither the stranding of the 'Pleiades' nor any other peril insured against, was the proximate cause of the payment of the reshipment charges."

Under the foregoing definition of the learned author, it is not necessary that the expense should have been proximately caused by the peril insured against, in the sense that an ordinary loss is caused by such peril, but it is sufficient that if, by reason

of a peril insured against, it became necessary to incur the expense in order that the goods shall reach their destination. This necessarily implies an intervening act of volition upon the part of the party charged with the duty of forwarding the cargo.

We will speak of this more in detail when we come to considering the cases. It is our present purpose to relieve the discussion of ambiguity cast upon it by the contention of the defendant.

Indeed, that ambiguity being disposed of, and a clear conception of the nature or foundation of these "particular charges" arrived at, it seems to us that the defendant's entire case is at and end.

More than this: Since the policy provides that the liability shall be determined by the *customs* of England, and since the learned author points out that it is "a practice of underwriters to pay such forwarding charges", we have, in that fact, a second conclusive answer to the defendant's contention, and a perfect case for the plaintiff.

There are some sub-heads in defendant's brief (pp. 39, 43 and 46), which are entirely beside the issue, and beg the whole question, and to which we shall give more specific attention later.

It nowhere appears in defendant's brief that he calls in question the foregoing statement of the law by *Arnould,* whose authority is as well established as

a decision of the House of Lords, and we might well rest upon it as the summing up of all the English law upon the subject. Nevertheless, it will not be out of place for us to examine the cases found in the record, touching this subject.

Before doing so, however, and for fear that a misapprehension might arise therefrom, we call attention to the suggestion of defendant (Br. pp. 12 and 13), that

> "The theory under which the recovery was allowed in this case was, therefore, that the payment of the $4050 was a 'particular charge' and partook of the nature of *particular average.* Particular charges are not, however, included in particular average under the express provisions of the English Marine Insurance Act."

From the foregoing analysis in explanation of the ground of said recovery, it will readily be seen that defendant's suggestion is not entirely correct. The theory of the recovery is, as stated by *Arnould,* that they are "another *class* of losses, which, though not specially enumerated in the policy, are nevertheless, recoverable thereunder."

Moreover, in the above statement, defendant overlooks the custom, above referred to, as a ground of recovery.

Neither do we think that the section of the Insurance Act, referred to by defendant (Sec. 64, Br. p. 13), in anywise helps his case. On the con-

trary, it supports our theory and contention. It defines "particular charges" and expressly distinguishes them from, not only "average charges" but also "salvage charges", which is only another term for "sue and labor" charges.

If, however, the distinction were to rest upon the theory suggested by defendant, we are still not convinced that it would not be right, because the policy, *in order to avoid what the underwriter deemed would otherwise be the effect of the warranty free from average,* makes a special provision that "notwithstanding this warranty" he shall pay these particular charges.

Now, what construction must be placed upon that language of the policy, other than that the underwriter considered the charges in the nature of particular average charges, liability for which, by reason of the warranty free from average, would be excluded under the policy, were it not for the "notwithstanding" clause?

We shall presently see that this is the result of the cases relied on by defendant, viz., *Great Indian Peninsula Railway Co. v. Saunders,* and *Booth v. Gair,* and that it is the result of this view of the charges taken in those cases [namely, that they are in the nature of particular average], that caused the adoption of the "notwithstanding" clause.

> "It is upon this warranty that our judgment depends." "The question we have to determine is whether the insured can recover this

> sum on a policy *containing this warranty.*" (*Great Indian etc.,* Rec. pp. 68, 69.)

This reason for the adoption in the policy of the "notwithstanding" clause is reflected not alone in the above mentioned provision in the Marine Insurance Act (Sec. 64), which provides that "particular charges are not included in particular average", but also by Sec. 76, sub-sec. 2 of that Act, which is, in effect, a *direct legislative overruling* of those decisions. It is as follows:

> "Sub-sec. 2. Where the subject matter insured is warranted free from particular average, either wholly or under a certain percenttage, *the insurer is nevertheless liable* for salvage charges, and for *particular charges* and other expenses properly incurred pursuant to the provisions of the 'suing and laboring' clause in order to avert a loss insured against." (Rec. p. 161.)

Custom and Usage.—This custom and usage, we think, is satisfactorily proven by the foregoing excerpts from *Arnould on Insurance,* but we have added thereto the authority of the cases we shall refer to, so that there shall be no question. This proof is undisputed, and, as we think, concludes the controversy in the present case.

Whether or no the charges be recoverable under the English law, it is sufficient, under the terms of this policy, that it is the practice or custom of the English underwriters to pay the same.

Indeed, as we shall presently show, this practice of the underwriters has been so incorporated into

the law of England, by virtue of the proof before and recognition by the English courts, as in itself to become a part of the common law of England.

The foregoing charges thus become payable by the underwriters regardless of any technical construction of the policy, and *regardless* of whether or no a peril insured against be the *proximate cause* of the expenditure. *It is sufficient to say that it is the custom of underwriters to pay them.*

CONSIDERATION OF THE CASES.

It will be noticed that the cases relied upon by the plaintiff at the hearing were introduced for three purposes: one, and principally, to prove the custom and usage of underwriters to pay this class of loss; another, to show that under the English law the expenditure is considered a loss by the perils of the sea; and a third to illustrate the evolution of the "notwithstanding" clause attached to the "warranted free of particular average" clause, and thereby incidentally demonstrating that, *so far as the construction of this particular policy is concerned,* "special charges" are to be treated as being in the nature of a particular average loss.

The two principal cases relied on by the defendant are also relied upon by the plaintiff.

The *defendant* uses them to prove that these expenditures cannot be recovered under the *"sue and labor"* clause, and also to avail himself of cer-

tain dicta which appear therein. The plaintiff uses them (one at least) to prove the custom to which we have adverted, and also to illustrate the evolution of the "notwithstanding" clause, as it appears in the present policy, which, in its turn, serves to fix upon the policy a construction which renders the insurer liable within the meaning of the phrase in said "notwithstanding" clause, "for which they would otherwise be liable".

We refer to the cases of the *Great Indian Peninsula Railway Co. v. Saunders,* Best & Smith, Q. B. 41, and, on appeal, 2 Best & Smith, Q. B. 266 (misquoted in the record as Ellis, Best & Smith), and the case of *Booth v. Gair,* 15 Com. Bench, 290:

In the former, the ground of the decision in the lower court was, that the loss, not being a total loss, was excluded *by the warranty against particular average.* We have already referred to a part of the language of the court applicable to this question, namely:

> "It is upon this warranty that our judgment depends." (Rec. p. 68.)

Again (and this is also important in its effect upon defendant's contention that it is not bound by the terms of the bill of lading):

> "As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of £825, 11s., 7d., was an extra expense incurred by the shippers of the goods, *in consequence of the sea risk which had frustrated the voyage of the 'Bombay';* and the question we have to determine is, whether the

> insured can recover this sum on a policy containing this warranty." (Rec. p. 69.)

Again:

> "We are of opinion that, if he could recover, it would be on the ground that the disbursement for the extra freight was part of the loss occasioned to the owner of these particular goods by the perils of the sea, or, in other words, a particular average on these goods, and, therefore, within the warranty." (Rec. p. 69.)

If we stop to consider this proposition we cannot escape the conclusion that, but for the warranty against particular average, the insurer must be liable. The court, however, said that it was not called upon to determine that question, though it had been so determined in America.

The loss, however, cannot be excluded by the warranty *against* particular average unless it be regarded *as a particular averge loss.* And if it be such a loss it is recoverable in a case, as the one at bar, where the application of the warranty is expressly withdrawn from that loss, to say nothing of the warranty being opened by the stranding, in both of which particulars the case at bar differs from those now under consideration.

Indeed, it is plainly evident, from the history of the law upon this subject, that the "notwithstanding" clause in these policies is the direct result of those decisions, and an effort on the part of the underwriters and assured to avoid their effect in this respect. It practically concedes that the expenditure is itself an average loss. This, be it

understood, was the situation during the earlier discussion of the question at issue.

The case also decided that the expenditure was not recoverable under the "sue and labor" clause, and defendant rests his reliance on the case to defeat the present recovery, upon the reasoning employed to show that it is not recoverable *under the "sue and labor"* clause. In this respect, we think we have already sufficiently indicated our distinction.

But defendant entirely ignores that part of the decision which holds that the loss is excluded by the "warranted free from average" clause.

This case was affirmed on appeal (2 B. & S. 266) on the same two grounds, the court, however, giving its principal attention to the "sue and labor" liability.

Booth v. Gair, 15 C. B. R. (N. S.) 290, was introduced by plaintiff, principally to supplement the proof of the custom and practice of underwriters to pay such charges.

That was a policy on cargo. It contained a "sue and labor" clause and also a warranty "free from particular average unless general".

After leaving New York the vessel met with sea perils, put into a port of refuge, where she was condemned and sold and part of her cargo transshipped to Liverpool at a freight exceeding the freight originally agreed on.

In this connection, it is well to note the difference between our freight agreement and the one in the above case. Ours was prepaid, and hence earned freight, while, evidently, the other was only earned on delivery at port of destination. Hence only the excess would be lost. Ours is also "excess freight" because the original freight was entirely lost.

That excess freight was the subject matter of the controversy.

The case was decided on the authority of *The Great Indian Peninsula Railway Co.* case, and hence is subject to the same comment respecting the nature of the loss (particular average) that we made on the latter case.

Booth v. Gair, however, contains another element, pertinent to the case at bar.

It will be recalled that under our policy the liability is to be governed by the *customs* of England, and in *Booth v. Gair* the following appears:

> "10. It was also admitted that, down to the date of the policy in this case, it was the custom of underwriters to pay charges on cargo of the nature of the items the subject of this case, except cooperage, under policies in the form of the policy in this case, under the name of 'particular charges'."

Now, the court did not decide the case in accordance with that custom, because, as explained in the subsequent case of *Kidston v. Empire Marine Ins.*

Co., 1 C. P. L. R. 535, the custom could not be permitted to change the terms of a written contract.

In the *Kidston* case the court comments at length upon both of the above cases (Rec. pp. 102-106), and not only says that in those cases "the decision and the *sole* decision" was, that in the case of goods "warranted free of particular average" recovery could not be had for such expenses under the "suing and laboring" clause (Rec. p. 103), but also points out with considerable clearness the error which those cases have undoubtedly made in considering only a contracted and special meaning of the word "average". (Rec. pp. 100-101.)

We will turn to this again. Suffice it to say, that the court there says that the cases "when examined prove to be anything but authority for the defendants". (Rec. p. 106.)

In returning, now, to the question of "custom", we find in the *Kidston* case the custom was again proven, and is stated in the report in the language used by *Arnould,* and quoted by us at pages 11-12 ante. It was upon a finding of the jury upon this custom that a verdict was entered for the plaintiff. (Rec. p. 91.)

In the language of the report:

> "The evidence given was for the purpose of showing that the charges of transshipping and forwarding had been considered to be what was called technically 'particular charges', and not particular average so as to be within the warranty. The verdict passed for the plaintiff's affirming the existence of the usage at the time when the policy was made." (Rec. p. 93.)

Again referring to the cases of *Great Peninsula Ry. v. Saunders,* and *Booth v. Gair,* the court says (Rec. p. 102):

> "Before these decisions, the liability of the underwriter appears to have been *universally admitted* and acted upon *even* in the cases where the expenses were incurred to forward goods *existing in specie* at the port of distress, and warranted free from particular average, *so that no liability could accrue to the underwriters by their not being forwarded.*"

Pausing here for a moment, we have from the foregoing this deduction to make: Before these decisions the liability had been "universally admitted and acted upon". Those decisions are, therefore, the chief, if, indeed, not the only reliance of defendant. But those decisions rested upon the exclusion of liability by the warranty "free from particular average", while in our policy, *the effect of these decisions is avoided* by the provision that "notwithstanding" the warranty "free from particular average", these charges shall be paid, if otherwise liable. If, but for these decisions, the liability had been "universally admitted and acted upon", it follows that our insurer is "otherwise liable". This also confirms our former suggestion that it was in order to avoid the effect of these particular decisions that the "notwithstanding" clause was adopted.

Defendant in the case at bar calls attention to the fact that in the *Kidston* case the insurance was *on freight,* while the case at bar is insurance on

cargo—which is true, and which, so far as regards the holding in the *Kidston* case that the loss was recoverable under the "sue and labor" clause, might be a valid distinction. But it does not affect the principles laid down in that case, nor the distinctions and criticisms therein of the *Great Indian Peninsula* and *Booth v. Gair,* and particularly it does not affect the question of proof of custom.

Connected with these particulars, we invite a careful and critical reading of that case—particularly we invite attention to what is said concerning the changing significance of the word "average" as a word used in a great variety of phases as applied to different subject matters, and not with any fixed or settled application. (Rec. 100-101.)

Concerning the sufficiency of this method of the proof of the custom, we need not waste any time in discussion, because it is admitted (Rec. p. 110.)

However, the language of the court in *Biddel Bros. v. Clement Horst Co.,* 16 Comm. Cas. 202-03, is interesting in this connection. (Rec. pp. 110-111.)

We come next to the two cases of

Popham & Willett v. St. Petersburg Ins. Co., 10 Comm. Cas. 31, and the same volume, page 276, to be found in the Record between pages 71 and 83, inclusive.

This was an insurance on goods *and* freight for a voyage from London to places in Siberia via the Kara Sea.

So far as the landing, warehousing and forwarding charges are concerned, *they were claimed under insurance on goods.*

The assured was carrying in his own or a chartered vessel, goods, belonging, some to himself and some to other parties. The goods that belonged to other persons were, upon the return of the vessel to the port of shipment, returned to their owners, and freight claimed under the terms of the bill of lading. The case concerned only the insurers *own* goods that were forwarded to their destination through Russia. (Rec. 73 bottom, 74 top):

> "The plaintiffs claimed in the action a total loss under the policies on freight and on goods; *also for a partial loss on the policies on their own goods, and for landing, warehousing, and forwarding expenses.* On the claims for total loss, the learned judge held that if there had been a total loss, it was a constructive loss, and that the plaintiffs, having given no notice of abandonment, they could not recover on those claims. The *present report deals with the case only so far* as it relates to the obstruction by ice and to the *claim for landing, warehousing and forwarding* expenses, in which the plaintiffs included the increased duty paid, as above stated."

We see, therefore, that the distinction which defendant claims between policy on *freight,* and policy on *cargo,* does not exist, with respect to this case.

It will also be borne in mind that after the obstruction by ice, the goods, as in the case at bar, were *returned to the port of shipment,* and were thereafter transshipped to the port of destination by another and different route.

The court said that the first question was whether or no the obstruction by ice was "a peril of the seas within the meaning of the policy", and held that it *was* such a peril. The court then continues:

> "With regard to the partial loss of *goods,* different considerations apply, because the absence of notice of abandonment does not prevent the plaintiffs from recovering for any partial loss which they, in fact, have suffered. They claim the expenses which have been incurred for landing, warehousing, and forwarding the goods. It is said that these expenses are not recoverable because the forwarding of the goods was not forwarding them upon the voyage insured—that the voyage insured was altogether abandoned as an adventure, and that the subsequent forwarding of the goods was a mere incident in their history, and on a totally different adventure."

The court overruled this objection, and held that they were entitled to recover for any partial loss suffered in consequence of the vessels being *prevented from arriving at their destination* by the ice.

It then takes up the question as to whether or no the duty paid could be recovered as part of the forwarding expenses, and held that it *could.*

That is the whole subject matter of that decision, namely, that the forwarding expenses of the goods were a *loss by a peril of the seas* within the meaning

of the policy, and could be recovered as a partial loss notwithstanding the "warranted free from average".

It is claimed, however, that the policy contained an express provision "to pay landing, warehousing and forwarding charges, as well as partial loss arising from transshipment and reshipment", and that the decision rested necessarily upon the proposition that the policy expressly insured the matters for which recovery was thus allowed.

Now, it will be seen from the foregoing decision, that the court was expressly and only *passing upon the "landing, warehousing and forwarding" expenses,* as the subject of the loss, and was *not* passing upon any "partial loss arising from *transshipment".* It will not, therefore, do to lay stress upon the last phrase of the forwarding provision by italicising the same, as defendant does (Br. p. 9), namely, the phrase "as well as partial loss arising from *transshipment* and reshipment", because, under the terms of the policy, the forwarding charges and the partial loss from transshipment are specifically named as *two different subject matters.* In the language of the policy, the partial loss therein named, *is not descriptive of the forwarding charges.* The difference between these two items, to our mind, is, that the "partial loss arising from transshipment or reshipment" refers to *damage to the goods arising from the transfer from one vessel to the other.* In other words, where the damage to the goods is caused by such transfer, and not directly caused by

the peril of the sea, that is also to be paid for. The forwarding charges are a different matter. This definition is supported by *Gow* (p. 187) and set out in this brief, post p. 36. The phrase is the equivalent of the provision in our policy likewise attached to the "forwarding" clause, viz.: "also to pay the insured value of *any package* or packages which may be totally lost *in transshipment*". The loss of a single package, is, of course, under our policy, a partial loss of the subject of insurance.

Under this construction of the policy, it is the same in effect as the policy in the case at bar, and the decision that the forwarding charges are recoverable, is a direct decision that they are recoverable in the case at bar. In the case at bar, we have "warranted free from average", yet, notwithstanding this warranty, underwriters to pay the forwarding charges. In the *Popham* case, the report (which is the only means we have of determining the terms of the policy), expressly places these two phrases in connection with each other. (Rec. p. 72.)

In view of the former decisions, hereinbefore commented upon, that the "warranted free from particular average" relieves the insurer from liability for forwarding charges, this placing of the two provisions in juxtaposition, when considering insurance on cargo, shows exactly what the court had in mind. Otherwise, if as claimed by defendant, the agreement to pay landing, warehousing and forwarding charges was an independent subject matter of insurance, it would not have been neces-

sary to refer to the "warranted free from average", at all. It would have been sufficient to have said that the policy insured that subject matter.

This view finds support in the second *Popham* case, where the court does not refer to the "warranted free from average" clause at all, but refers to the "sue and labor" clause in connection with the "to pay landing, warehousing and forwarding" charges, etc., because it is insurance on *freight.*

It will also be noticed that the first case was decided in November, 1904, while the *Great Indian Peninsula* case was decided in 1861.

The second *Popham* case is of interest to us because of the holding therein that the freight, being, by the *terms of the bill of lading,* payable when the goods were returned to London (the port of shipment) after the failure of the expedition, *whether the goods were forwarded or not,* was lost—that the assured are entitled to recover these forwarding expenses, and are not bound to give credit *for that which they have not saved,* namely, "the amount of the freight".

The next case referred to by defendant is that of Meyer v. Ralli, 3d Aspinw. 324. This is a case offered by the defendant.

We do not understand the purpose of the offer. The case was not one where a recovery of forwarding charges was under consideration. The cargo was covered by a policy of insurance warranted

free of particular average, and contained a "sue and labor" clause. The vessel was taken in distress to the port of La Rochelle, where the cargo was landed and warehoused under an order of the court, and all of it sold under decree of the court. The freight money with the exception of one hundred and fifty (150) pounds, was unpaid, and the court held that the freight was due in its entirety, and condemned the plaintiffs to pay the same, and it was ultimately paid out of the proceeds of the cargo.

The questions that arose in the case were:

> "First, whether there was a constructive total loss of the cargo;"
>
> "Secondly, if not, whether the plaintiff is entitled to recover any and what portion of the expenses under the *'sue and labor' clause"*. (Rec. pp. 149, 150.)

As neither of these questions are under consideration in the present case, the materiality of the case does not appeal to us. The court held that after the cargo had been unshipped it was in a state of heat and partial fermentation from sea water, and if it had been allowed to go on, it would have resulted in an actual total loss, and hence plaintiff could recover under the "sue and labor" clause.

The following language of the court, however, is of interest:

> "It cannot be contended, since the case of Kidston v. Empire Marine Assurance Company (L. R. 1 C. P. 535; 2 Mar. Law. Cas. O. S. 400, 468), that the warranty 'free from particular

> average' excludes the operation of the suing and labouring clause; and that case is also an authority that the occasion upon which the expenses in this case were incurred, was such as to be within it. As to the cases of Great Indian Peninsula Company v. Saunders (1 B. & S. 41; 2 B. & S. 266; 6 L. T. Rep. 297; 31 L. J. 206, Q. B.), and Booth v. Gair (9 L. T. Rep. 386; 33 L. J. 99; 15 C. B. N. S. 291), cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in Kidston v. Empire Marine Assurance Company." (sup.)

There is absolutely no question in that case with regard to average or particular charges.

The quotation from

Gow on Ins., p. 186 (Rec. p. 120), in no wise affects our contention that under the terms of the policy, insurers are liable for the forwarding charges as "special charges", or as *Arnould* and insurance adjusters term them, "particular charges". On the contrary, it confirms such contention, for it expressly refers to "warehousing, reshipping and forwarding charges" as being *always* charged by the shipowner

> "against the cargo, and are admitted by law in certain cases as properly chargeable. Underwriters agree to assume responsibility for their proportion of such charges, and this arrangement was embodied in what is known as the forwarding clause."

The mere fact that they had changed the form so as to exclude "special charges" not already thus

recognized as included in "an ordinary English 'clean' policy", does not justify the argument that it was intended to exclude "warehousing, reshipping and forwarding charges", which the author says are always "charged against the cargo and admitted by law in certain cases as properly chargeable", and for which the underwriters agree to be responsible.

Any other construction of the policy would render the clause useless, for if under the ordinary form of the policy underwriters were not liable, what purpose could be served by providing that the "Warranted free from average" shall not exclude them —"Underwriters, notwithstanding this warranty to pay" them?

But defendant stopped at the wrong place in his quotation from *Gow*. Following his quotation we find *(Gow,* p. 187):

> "Such were the stages in the history of the F. P. A. clause as it is now known. At a general meeting of the underwriting community of the United Kingdom, assembled at Lloyd's on the 17th July, 1883, a form of clause was adopted which has become the customary English form, and is, in absence of any special agreement between assured and underwriter, *the* F. P. A. clause; it reads:
>
> 'Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping or forwarding, for which they

would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transshipment.[1] Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom'.

[1]*Transshipment* means generally the act of transferring goods from a vessel in which they have been carried to another vessel for the completion of their voyage. If taken strictly, its application in this clause is confined to the mere act of lifting from the earlier vessel to the later vessel employed in the carriage of the goods, or if a lighter or other craft is employed to carry the goods between the vessels—from the earlier vessel to the lighter and from the lighter to the later vessel. It is reasonably extended to the conveyance between the two vessels, but does it include any stay on quay in case the first vessel discharges direct on to quay and the second loads direct from quay? So long as the stay on quay is merely incidental to the removal from one vessel to another, the inclusion of the risk for a moderate time is not unreasonable, but the moment that stay becomes delay or storage the case becomes doubtful".

Three things are apparent from this conclusion: 1. The "forwarding charges" are considered in connection with and as part of the F. P. A. clause, giving support to our contention that it was considered at least of the nature of "particular average". 2. That the underwriters adopted it in 1883, showing that at that date they formally expressed their dissent from the ruling in the *Great Indian Peninsula* case; and, 3. That "transshipment" is not synonymous with "forwarding", but is simply

the act of transferring from one vessel to another, as suggested in our review of the *Popham* case, ante, p. 28, 31.

Résumé.

To sum up, therefore, we find that defendant rests his entire argument upon the authority of the *Great Indian Peninsula Railway v. Saunders,* as a case "directly in point and that it should control the determination of this branch of the case." (Br. p. 29.)

In the foregoing, we think we have satisfactorily shown that it is not even applicable to this case, much less an expression of the English law of the present day.

We have shown that it is not only pointed out in the *Kidston* case that, in the *Great Indian* case the "court carefully abstained from deciding the question now before us" (Rec. p. 103), but the *Kidston* case also definitely established the distinction between "particular charges" and "particular average". (*Arnould,* Rec. p. 57.)

Again: So far as the present case is concerned, the *Great Indian Peninsula* case rested upon the fact that the right of recovery was excluded by the F. P. A. clause, while in our case such effect, if any, of the F. P. A. clause, is avoided by the "notwithstanding" clause.

Again: In our case the F. P. A. clause is opened, and its effect thus destroyed, by virtue of the fact that our vessel stranded.

In this connection, it will be noticed that in the *Great Indian Peninsula* case it was expressly noted that the vessel "was neither stranded, sunk or burnt" (Rec. p. 68), thus emphasizing the distinction.

Again: The question of custom was not involved in the *Great Indian Peninsula* case, while in our case it forms an independent basis of decision.

And lastly: The principle upon which the *Great Indian Peninsula* case was decided, and hence the case itself, is expressly overruled by an Act of Parliament, namely, the Marine Insurance Act, Sec. 76, sub-sec. 2, as well as Sec. 64.

In addition, we have the later authority of *Popham & Willitts v. St. Petersburg Insurance Co.,* 10 Comm. Cas. 31.

We must conclude, therefore, that *Arnould* is right in his statement of the present law of England touching this subject, not only by reason of his own great authority, but also by reason of the cases and statutes which we have reviewed.

II.

PROXIMATE CAUSE.

It remains only to notice the contention made by defendant under the head of "Proximate Cause".

1. If we be right in our foregoing contention, namely, that the forwarding charges are "particular charges", which under a cargo policy are neither

salvage charges, nor particular average charges, but a third class of loss, which, though not directly caused by the peril insured against, nevertheless arise from a situation such as renders it necessary to incur the expense in order that the goods shall reach their destination, then the question of proximate cause, in the strict sense, becomes immaterial. In fact, as shown in the earlier part of this brief, *Arnould* considers such a charge as, in fact, "a loss directly due to such peril" because

> "one of the objects of the insurance on goods is to guarantee that the goods shall reach their destination."

We note, in this connection, that the author does not say that it is a loss directly *caused* by such peril, but "a loss directly *due* to such peril", thereby indicating the distinction for which we are contending, between such a loss and other losses, with respect to the rule of proximate cause.

On the other hand, even the *Great Peninsula* case, regards the extra freight as "part of the loss occasioned to the owner of these particular goods by perils of the sea" because it frustrated the voyage. (Rec. p. 69.)

So in the *Kidston* case it is noted that before the *Great Peninsula* case underwriters universally admitted the liability, even where the goods existed in specie and no liability would accrue by their not being forwarded. (Rec. p. 102.)

And in the *Popham* case it was expressly held that where a peril *prevented the vessel from arriving*

at her destination, such forwarding charges were *a loss by a peril* of the sea (ante, p. 30).

So it seems to us that the question of proximate cause does not properly arise in this case.

2. Moreover, the facts upon which defendant rests his contention, that the peril of the sea was not the proximate cause of the payment of the reshipment charges, do not constitute a fair statement of the case. His argument is based upon the following:

> "Two other distinct causes intervened, making the reshipment necessary; first, the contract of the plaintiff with the Panama Canal Commission with the resulting necessity of the plaintiff to avoid delay in the performance of such contract; and, second, the bankruptcy of the California Atlantic Steamship Company, the owner [charterer] of the 'Pleiades' which resulted in the abandonment of the voyage." (Br. p. 30.)

(a) Let us consider the latter first:

The statement itself is a mere inference drawn from the fact that the vessel was redelivered to the California Atlantic Steamship Company on December 27th, and that the plaintiff received notice of the bankruptcy January 1st or 2nd, and the ship never went on the voyage. (Rec. p. 54.)

In the first place, there is no necessary connection between the bankruptcy of the charterer and the failure of the vessel to complete the voyage, for there was nothing to prevent the owner of the ship from completing the voyage.

But be that as it may, the bankruptcy of the charterer cannot be held to be the cause of the incurring of forwarding charges on goods *actually forwarded on another vessel of the same charterer* [the "Mackinaw"], leaving port on October 17th. The California Atlantic Steamship Company *did* carry the cargo forward to its destination, and that, too, at a time when it does not appear to have been bankrupt.

So it is a plea of despair that attempts to assign such bankruptcy as an intervening cause making the reshipment necessary.

As already suggested, it may, or may not, have been a cause why the vessel, after being repaired, did not proceed upon the voyage. But that is immaterial in the present case, because both by the terms of the bill of lading and the admitted law of England.

> "If by reason of damage done to a ship she cannot be repaired *without a very great loss of time*, the master is at liberty to procure another ship to transport the cargo to the place of destination." (Ans. Art. V, Rec. p. 20.)

Also:

> "On the happening of any of the herein excepted contingencies [stranding * * * detention or accidental delay], the carriers are to have the right to forward the above mentioned packages to the port of destination on their own routes, and shall receive extra compensation for such service." (Bill of Lading.)

It was not, therefore, essential, as contended by defendant, that the goods should be detained, during

this long delay in repairs, in order that they might be forwarded in the original vessel. Both under the law and the terms of the contract, the right to forward the goods by another vessel was given to the plaintiff.

Indeed, had they gone forward in the original vessel, the original freight having been earned at the time of the stranding and the vessel returned to her original port of destination, a second freight would also have been payable under the contract of carriage.

As said by this court in the case of *Portland Flour Mills Co. v. British & Foreign Marine Insurance Co.,* 130 Fed. 680: 863-64

> "The contract as made between the parties is a valid one that can be enforced. It is competent for the parties to a contract of affreightment to stipulate expressly that the freight, or a part thereof, shall be payable absolutely at the time of the shipment of the cargo, or at a certain time thereafter, without regard to the performance of the contract."

So how could the bankruptcy of the charterer, or the necessity of plaintiff to avoid delay under its Panama Canal contract, be a cause of the *incurring* of these extra expenses?

(b) And yet defendant further claims that:

> "The contract of the plaintiff with the Panama Canal Commission with the resulting necessity of the plaintiff to avoid delay in the performance of such contract, must be taken

> as the real and controlling reason for the *immediate transshipment* of the explosives."

Well, and what of it? If the expense must be equally incurred whether the goods be *immediately* transshiped, or sent forward after the repairs, any *reason* for *immediate* rather than *later* transshipment is immaterial, because the expense is not thereby increased.

(c) But here another principle intervenes. *Arnould* says,

> "One of the objects of an insurance on goods is to guarantee that the goods shall reach their destination",

for which reason that author says,

> "That the practice of underwriters * * * to pay such excess as particular charges" * * * "is correct in principle."

So, again, in *Barker v. Blakes,* 9 East's Rep. p. 282, Lord Ellenborough said:

> "And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the *prolonged detention of the ship and cargo,* may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of such voyage; provided such loss has been followed by a sufficiently prompt and immediate notice of abandonment," etc. (Rec. pp. 58, *64-65.)*

So, also, reverting again to the language of the *Great Indian Peninsula* case (Rec. pp. 68, 69):

> "As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of £825, 11s., 7d., was an extra expense incurred by the shippers of the goods, in consequence of the sea risk which *had frustrated the voyage of the 'Bombay'.*"

In *Embiricos v. Sydney Reid & Co.,* (1914) 3 L. R., K. B. D., p. 54, Scrutton, J., laid down the following principle:

> "Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds."

This is recognized in the admitted legal principle so often referred to, namely,

> "If by reason of damage done to a ship she cannot be repaired without a very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination."

This would seem to end the discussion regarding the necessity of plaintiff to avoid delay in the performance of its Panama Canal Commission contract, as being the controlling reason for the immediate shipment of the explosives, and therefore the proximate cause of the loss.

Whatever the controlling reason for acting, the fact that the ship could not be repaired without a very great loss of time conferred the right, and the reason for exercising the right becomes immaterial,

so long as the plaintiff was acting "on reasonable commercial probabilities at the time when they are [it is] called upon to make up their [its] mind."

In the *Embericos* case, the ship was detained because the Dardanelles were closed to her passage; thereafter, during seven days, other ships were allowed to pass, and this ship, had she been loaded within her lay days, *could also* have passed—but never did, as in our case the "Pleiades" might have gone forward, but never did. Were we to wait to find out "by what in fact happened" if she ever would go forward only to find out that she would not?

In the last mentioned case, the court referred to "the well-known doctrine of frustration of the commercial adventure, laid down in JACKSON v. UNION MARINE INS. Co., (1874) (L. R. 10 C. P. 125)."

That was a case of insurance on chartered freight.

The plaintiff, a shipowner, entered into a charter-party by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted), from Liverpool to Newport, and there load a cargo of iron rails for San Francisco.

The ship sailed from Liverpool on the 2nd of January, and on the 3rd went aground in Carnarvon Bay. She was got off by the 18th of February, and proceeded to repair, completing her repairs at the end of August.

In the meantime, on February 15th, the charterers threw up the charter, and employed another ship

to carry the rails (which were wanted for the construction of a railway) to San Francisco.

Concerning the necessity of forwarding the rails, the defendants raised the point that "the loss of freight was not the immediate consequence of the sea damage, but of the right exercised by the charterers of throwing up the charter-party, which they might, or might not, have done, and in doing which they were influenced by the exigency of the particular case, and the necessity of getting the rails to San Francisco as soon as possible." (10 L. R., 10 C. P. 127.)

In an action by the plaintiff on the policy of insurance on chartered freight, the jury found that "*the time necessary* for getting the ship off and *repairing her,* was so long as to *put an end, in a commercial sense,* to the commercial speculation entered upon by the shipowner and the charterers." (L. R. 10 C. P. 126.)

The court held that

> "There is a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated. And in either case * * * non-arrival and incapacity by that time ends the contract; the principle being, that, through non-performance of a condition may be excused,

> it does not take away the right to rescind from him for whose benefit the condition was introduced." (L. R. 10 C. P. 145.)

Under these facts, the court held that there was a loss of freight by perils of the sea, and to the suggestion that the proximate cause of the loss was the refusal of the charterers to load, the court said, that

> "the voyage, the adventure, was frustrated by perils of the sea, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement." (p. 148.)

The court further said,

> "Even if not, the maxim does not apply,"

that in case of goods carried part of the voyage, and ship lost, but goods saved, the ship owner may carry them on, but is not bound. But if he does not, his freight is lost. So, if he does not choose to repair the ship, which remains in specie, but is a constructive total loss.

The judgment for the plaintiff was affirmed.

It seems to us that this is a parallel case to the one at bar, so far as the question now raised by the defendant is concerned; in our case, the right to forward the cargo in case of an unreasonable delay being expressly given, both by the admitted law of the country, and by the contract of affreightment. True, the parties were not bound to forward it at once, but they were permitted to forward it at once, and, as said in the *Jackson* case, the maxim *causa proxima non remota* does not apply.

We are conscious that the foregoing cases are not contained in the record on appeal, but the opening statement of plaintiff in his brief, that the determinations by the District Court of the question of English law were * * * merely conclusions of law, relieves us of any embarrassment in that regard.

Moreover, the English law, unlike Continental law, being evidenced in its reports the same as American law, and such reports being freely consulted by our courts in determining questions of American law, there can be no incongruity in a case of this sort, in turning to the English Reports to ascertain the rule whether or no the cases have been specifically placed in evidence at the trial. Besides, this being a common law case, if erroneously decided, must be sent back for a new trial, where this case could then be introduced, and the same result attained as if judicial notice were now taken of it by this court.

(d) In view of the foregoing, it would appear unnecessary to refer to defendant's point "c" (Br. p. 43), wherein he appeals to Sec. 55, Subdiv. b of the Marine Insurance Act.

Though we feel it fully answered in the foregoing, we do not care, for the mere sake of brevity, to pass it by.

He says:

> "Both under the law of England and by the express provisions of the policy in suit, the insurer is not liable for losses *occasioned* by delay in arrival at the port of destination."

He cites *Taylor v. Dunbar,* 4 C. B., L. R. 206, and ~~and~~ points to the warranty in the policy of "*freight* free from claims consequent upon loss of time", etc., and sets out the statute.

Now, what does the rule contained in those authorities mean?

Taylor v. Dunbar was a case where a *cargo* [*meat*] *putrified* because the vessel, by reason of bad weather, did not make her expected time on the voyage. It was the deterioration of the *goods* because of delay, a direct action upon the subject-matter of insurance.

The rule of that case is expressed in the statute referred to:

> "Unless the policy otherwise provides, the insurer on ship or goods is not *liable for any loss proximately caused by delay,* although the delay be caused by perils insured against."

Now no such condition exists in this case. We are not seeking to recover "for any loss proximately caused by delay".

In the first place, there was no delay. We shipped the goods without delay.

In the next place, there was no damage to the goods.

Defendant's reference to the terms of the policy is also unfortunate, for he fails to appreciate the effect of the warranty to which he calls attention. It is *confined to freight.* Being so confined, would it not, where nothing else appears, lead to the con-

struction that other subjects of insurance are not free from such claim? Again, *"loss of time"* being thus expressly provided for in the policy for a single subject of insurance (which is not the subject here in controversy), it follows that "loss of time" was necessarily in contemplation of the parties when the insurance was effected, and therefore included within the provision of the policy.

> "All other perils, losses or misfortunes that may have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof."

We respectfully suggest that, by reason of the above mentioned warranty, "loss of time" being a peril "specifically mentioned in the policy", is included within the term "all other perils", within the meaning of the rule of construction laid down in the Insurance Act, namely, "The term 'all other perils' includes any perils similar in kind to the perils specifically mentioned in the policy." (Rec. p. 121.)

If so, it is "otherwise provided in the policy" within the meaning of that language in the section of the Insurance Act above referred to.

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,
February 25, 1918.

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